Discretionary Disclosures

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Era of Openness & Transparency

President Obama instructed in a Memorandum on January 21, 2009

"The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails."

"I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency …."

Era of Openness & Transparency

"… Government should not keep information confidential merely because public officials might …

… be embarrassed by disclosure

… because errors and failures might be revealed

… because of speculative or abstract fears"

Attorney General's Memorandum

Attorney General Holder issued a Memorandum on March 19, 2009

"An agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information."

"Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."

Exemptions that DO NOT lend themselves to discretionary disclosure

- Exemption 1 – Classified Information
- Exemption 3 – Statutorily Exempt Information
- Exemption 4 – Commercial or Financial Information
- Exemption 6 – Personal Privacy Information
- Exemption 7 – Law Enforcement Information

Recognized Need to Continue to Protect

- National Security Information
- Personal Privacy
- Proprietary Records
- Law Enforcement Interests

Exemptions that lend themselves to discretionary disclosure

- Exemption 2 – Internal Personnel Rules/Practices
- Exemption 5 – Deliberative/Attorney Work-product/Attorney-Client Privileges

Issues to take into account when considering discretionary disclosure

Is there any foreseeable harm in release?

When looking at deliberative process privilege:

- Sensitivity of the record's content
- Age of the document

(As identified by Dept of Justice)

Reporting Requirements

- Keep track of discretionary disclosures
  - Number of instances
  - Exemption you could have applied
  - Number of pages released

Questions??